OFFICE SUPREME COURT, U.S.
FILED
SEP 1964
JOHN F. DAVIS, CLERK

No. 807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED AIRCRAFT CORPORATION, PRATT & WHITNEY AIRCRAFT DIVISION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GERARD D. REILLY
JOSEPH C. WELLS
1120 Tower Building
Washington, D. C. 20005
Attorneys for Petitioner

REILLY AND WELLS
1120 Tower Building
Washington, D. C. 20005
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
1. The Facts	3
2. The Board's Decision and Order	9
3. The Second Circuit's Decision	11
Reasons for Granting the Writ	12
Conclusion	20
Appendix A	1a
Appendix B	2a

AUTHORITIES CITED

Cases:

Caterpillar Tractor Co. v. N.L.R.B., 230 F. 2d 357 (C.A. 7) 20

Maryland Drydock Co. v. N.L.R.B., 183 F. 2d 538 (C.A. 4) 18, 20

N.L.R.B. v. Aintree Corp., 135 F. 2d 395 (C.A. 7) 18, 20

N.L.R.B. v. Babcock & Wilcox Co., 351 U.S. 105 ..... 12, 15

N.L.R.B. v. Le Tourneau Co., 324 U.S. 793 ..... 12, 14

N.L.R.B. v. Rockwell Mfg. Co., 271 F. 2d 109 (C.A. 3) 11, 12

N.L.R.B. v. United Steelworkers of America, 357 U.S. 357 ..... 12, 16

Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 ..... 12, 14

Stoddard-Quirk Mfg. Co., 138 NLRB 615 14

Statutes:

National Labor Relations Act

§ 7 ..... 3, 1a

§ 8(a)(1) 3, 2a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

UNITED AIRCRAFT CORPORATION, PRATT & WHITNEY AIRCRAFT DIVISION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United Aircraft Corporation, Pratt & Whitney Aircraft Division, prays that a writ of certiorari issue to review the ~~judgment~~ decree of the United States Court of Appeals for the Second Circuit entered in this case on ~~November 6, 1963~~ December 2, 1963.

OPINIONS BELOW

The decision and order of the National Labor Relations Board (herein called the Board) is reported at 139 N.L.R.B. 39, and is printed in the Joint Appen-

dix filed herewith (J.A. 1).[1] The opinion of the Court of Appeals is reported at 324 F. 2d 128, and is printed in Appendix B hereto, *infra*, pp. 2a-8a.

JURISDICTION

The decree (infra, p. 9a) of the Court of Appeals was entered on November 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Board must consider evidence adduced by an employer showing that the union and its supporters had ample opportunity off the employer's premises to distribute union literature to employees at the single entrance to the employer's plant and in context with that evidence, and other evidence showing alternative methods of communication, evaluate the employer's reasons for invoking a ban on further distribution on its premises before rejecting the employer's reasons for the ban, finding the ban a violation of Section 8(a)(1) of the National Labor Relations Act, and entering an order preventing the employer from promulgating or enforcing "any" prohibition against employees distributing "any" union literature on their own time in nonworking areas of the employer's premises.

2. Whether an employer's ban on the further use of its premises for the distribution by employees dur-

[1] Numbers following the abbreviations "J.A." refer to pages of the Joint Appendix in the court below, nine copies of which have been filed with the Court. Occasional references to pages of the original transcript of hearing are identified by the abbreviation "Tr.".

ing nonworking times of provocative union literature, disruptive of production and discipline, violates Section 8(a)(1) of the National Labor Relations Act.

STATUTE INVOLVED

The statutory provisions involved are Sections 7 and 8(a)(1) of the National Labor Relations Act (herein called the Act). They are printed in Appendix A hereto, *infra*, p. 1a.

STATEMENT OF THE CASE

1. The Facts

Petitioner and United Automobile, Aircraft & Agricultural Implement Workers of America and its Local 1234 (herein called the Union) have been in continuous contractual relations since 1953 (J.A. 80-81). The current contract provided for grievance procedures and union bulletin board privileges in the plant (J.A. 62-63, 64). Petitioner employs about 5,000 employees at the plant here involved, of which about 4,000 are in the unit represented by the Union (J.A. 81). There is no contention that petitioner in any respect sought to interfere with the union activities of its employees or with the Union's efforts to increase its membership.

Until 1956, the Union had distributed literature to employees off company property, usually at the base of a ramp leading from the public roadway onto petitioner's premises (J.A. 156). In that year, the Union requested and was given permission for employees, during nonworking times, to distribute union literature on company premises at the two tunnels used by employees in walking between the company parking lots and the plant proper (J.A. 156, 82-83).

The distribution was always made to employees on the three shifts as they entered the plant for work (J.A. 85, 102, 109, 156). As a result, the literature was carried into the plant and frequently discarded in the tunnels, the cafeterias, the restrooms, the locker-rooms and the shop floor (J.A. 157, 165, 167). This littering was called to the attention of the Union several times (J.A. 157). Petitioner, on the other hand, made its bi-weekly and monthly publications available to employees only as they left the plant at the end of their shifts (J.A. 157-158).

In December 1958, employees complained of abusive language by employee Celentano, then president of the Union, when they refused to accept the Union literature he was distributing (J.A. 111, 148, 168). Because of this, petitioner barred Celentano's further participation in distributions on its premises (J.A. 87). In July 1959, the Union was still pressing a grievance filed because of petitioner's action against Celentano (J.A. 167, 148).

During the first part of 1959, International Representative Greenberg was the administrator of the Union (J.A. 88). In May 1959, Greenberg, to promote an increase in union memberships and dues check off authorizations, distributed leaflets at the plant tunnels which likened working for petitioner to life under communism and fascism, characterized petitioner's officials as "Fascist", "Communist", "Storm Trooper" and "Indian Giver", and promised to expose how employees had been "hoodwinked out of raises" (J.A. 66-69). Petitioner without success, protested to the Union about the contents of these leaflets (J.A. 147-148).

In June 1959, Chamberlain became president of the Union (J.A. 80). Hall, petitioner's personnel supervisor, promptly met with Chamberlain in an effort to improve relationships between petitioner and the Union by suggesting timely discussion of disagreements and greater use of the grievance procedures of the contract, instead of publication of supposed grievances in leaflets and the continuation of Greenberg's attempt to stir up trouble by distributing leaflets vilifying petitioner's officials and containing unfounded accusations (J.A. 90, 116-117, 152-153, 162, 164). Chamberlain rebuffed Hall's efforts.

Between June 23 and September 16, 1959, the Union distributed campaign leaflets on the company's premises at the tunnels which leaflets, among other things, criticized the food served in the cafeteria and made assertions, unfounded in fact, about the operation of the cafeteria and the prices it charged (J.A. 28, 36, 38, 40); implied that the company had refused to consider Union "sound and concrete plans" for relieving traffic at change of shift times (J.A. 28-29, 42), when the Union never submitted any such plans to management (see J.A. 116, 117, 154; Tr. 336-337); asserted that the employees were required to work in "hot, stickly, oily atmosphere," without ventilation or "relief from the oppressive, strength sapping, mind weakening wet heat," and that a "man or woman who dies from heat prostration in October is just as dead as one who died in July" (J.A. 32, 36-37, 39, 42); characterized management as "arrogant" (J.A. 54, 49), greedy, lustful and drunk from power (J.A. 32); termed the protest of "a high official of the company" against the leaflet criticisms of the cafeterias an "abusive," "seathing personal attack," a "senseless

diatribe" (cf. J.A. 40-41 with J.A. 88-89); asserted that employees were in "bondage" (J.A. 31), being "cheated" (J.A. 55) and "pushed, pushed, pushed for production" (J.A. 32); and termed the contract with the company, negotiated by preceding Union administrations, a "travesty on justice," a "joke book" (J.A. 34), "one of the worst contracts in the aircraft industry" (J.A. 35).

Petitioner complained, unsuccessfully, to Chamberlain and other Union officials about the content of these leaflets, and warned them that permission to distribute Union literature on company premises might be withdrawn (J.A. 160-161, 165-166, 149).

In his leaflets of August 24 and September 1, Chamberlain renewed his criticism of the food and prices at the cafeteria, asserting that the cafeteria "offers such delicacies as greasy french fried potatoes, warmed over hamburgs and frankforts—all at regular prices," and stating that "more and more workers are carrying their lunches, not by choice, but by necessity" (J.A. 36, 38). Assistant Personnel Manager Corper informed Chamberlain that since he had had no experience in the restaurant business he was not qualified to tell the company how to run its cafeterias, and warned Chamberlain that the cafeterias were operated for the convenience of the employees and could be discontinued (J.A. 88-89, 87).

About September 1, employees on the 11 and 11:15 lunch hour shifts commenced a boycott of one of the cafeterias by bringing their own lunches, sitting at the tables, and "booing" anyone who approached the food line (J.A. 150-151, 118-119). The demonstrations continued for about two weeks, and increased to the point

where the company's representatives feared that they might develop into something more than "just booing" (J.A. 151, 159). Employees using the other cafeteria began to leave their trays on the tables rather than put them on the conveyor belt (Tr. 369). The booing finally ceased after the company warned the employees on these shifts that if it continued they would be denied use of the cafeteria and perhaps otherwise disciplined and supervisors stationed themselves in the cafeteria to see that the warning was heeded (J.A. 151-152, 158-59).

On September 8, in the middle of the demonstrations in the cafeteria, and while the company was trying to handle the situation, Chamberlain distributed another provocative leaflet about the food and prices in the cafeterias, reciting that "the people in this plant suddenly rose up and said in effect, 'We have had enough!' Customers began staying away in droves, and lunch bags and thermos bottles became the order of the day!" (J.A. 40, see 159).

Concluding that the leaflets had in "substantial" part provoked the cafeteria demonstrations (J.A. 159-160), Hall, on September 16, informed Chamberlain that the Union in several ways had abused the privilege of distributing literature on the company's premises and that the privilege was being withdrawn (J.A. 155, 86-87).[2] Hall mentioned the "litter problem", the Celentano matter and the Greenberg leaflets (*ibid.*). Hall reminded Chamberlain that he had warned him previously that the Company "objected to

[2] The Union's leaflet of November 24, 1959, stated "They pushed us out into Washington Ave. for having 'incited' people in the cafeteria issue" (J.A. 71).

this distribution of flyers which were designed to incite employees and to tell them what a lousy place Pratt Whitney was to work" and stated that the company did not intend to make its "property available for the distribution of such literature" (J.A. 155-156, 87). A few days later, Hall repeated the reasons for the ban to the Union's International Representative DiLorenzo (J.A. 147).

Since September 16, 1959, the Union has been distributing its literature where it did until 1956—at the foot of the ramp at the only entrance to the company's premises (J.A. 89, 85). Petitioner showed that the Union and its supporters had adequate opportunity to distribute literature to employees at this place (J.A. 143-144, 107-108, 152, 122, 106), and Chamberlain admitted, on company questioning, that there is no "problem" distributing leaflets at the ramp and that the Union has "a system that works very well" (J.A. 134). Between August 1959 and the hearing in May 1960, the Union's membership increased from about 1600 to over 2300 (J.A. 113).

After September 16, the Union in its literature continued to publish provocative and derogatory statements about the cafeteria (J.A. 73, 75, 70-72), plant ventilation (J.A. 73), and the company's alleged refusal to consider Union plans for improving traffic notwithstanding that no such plans were ever submitted to the company (J.A. 73; Tr. 336-337); continued to disparage the existing contract between the company and the Union as a "flagrant and shameful miscarriage of justice," a "foolish book of double-talk," a "joke book" (J.A. 73, 76); and continued to provoke and incite employees by promised revelations regarding "'The Ghost of Maloney.' New and startling informa-

tion in a scandal thought to be dead" (J.A. 74), which when released would cause "excitement" and "consternation" (J.A. 76), and which would be released after "new information" received was "checked carefully" (J.A. 69-70), and " 'The Work Order Scandal.' How the abuse of work orders has created a monster which must strangle those who gave it birth" (J.A. 75), which will "tell the truth about the handling of work orders, and how the handling affects not only the worker's future but the company's future as well" (J.A. 76) and expose how the "abuse of work orders, and the growing malignancy which such abuse inevitably nourishes, will be our strongest witness in our case against 'The Merit Raise System' " (J.A. 70). Needless to say these promised exposures never appeared (J.A. 123).

It was not claimed that petitioner, in any manner, sought to restrict oral solicitation of union membership on company premises.

2. The Board's Decision and Order

The Board, without discussion, adopted the "findings, conclusions, and recommendations of the Trial Examiner" (J.A. 2), and entered an order restraining petitioner from "promulgating or enforcing *any* rule or order prohibiting employees, when they are on nonworking time and in nonworking areas of the plant, from distributing *any* [union] leaflets," etc. (J.A. 2-3; italics added).[3]

---

[3] It is significant that the Board, in issuing this broad order, refused even to concede, contrary to the Trial Examiner, that a ban against use of company premises to distribute leaflets of the Greenberg type would be lawful (J.A. 2, fn. 1).

The Trial Examiner held that, although an employer has the "undisputed right" to "deny employees access to its property to distribute union literature when such denial is necessary to maintain production or discipline," petitioner's September 16 action nonetheless was unlawful (J.A. 14). He premised his conclusion, in part, upon the view that the employees' right to use the company's premises "is not lost simply because the information imparted is not entirely accurate, or is exaggerated or objectionable to the employer, provided, of course, the information is not deliberately false or maliciously inspired" (J.A. 15). Although agreeing that the language in the Greenberg leaflets "appears to have gone beyond the pale of protected concerted activity" and might have justified a ban on literature containing similar language (J.A. 16),[4] he stated of the Chamberlain leaflets that "Although the Union's criticism of Respondent in these leaflets was sharp and definitely not without partisan appeal, and understandably irritating," it "did not exceed the proper bounds of lawful comment and concerted activity" (J.A. 15-16). He refused to find that the "Union's leaflets encouraged and contributed to the disturbances in the cafeteria" stating that there is "nothing in the leaflets which advocated such action" (J.A. 17). But then added, "even assuming that the leaflets incited the booing in the cafeteria," the Company had "not demonstrated that the ban was necessary" (J.A. 17). He dismissed the littering and Celentano matter with only passing comment (J.A. 11). Finally, he held irrelevant the existence of other means of distributing

---

[4] As noted above (fn. 3) the Board refused to adopt even this limitation on the kind of literature the Union could insist on distributing on petitioner's premises.

literature to employees, the existence of grievance procedures through which complaints could be aired with management, and the absence of antiunion motivation in the withdrawal of the use of company premises for the distribution of the literature involved *thereby expressly finding "it unnecessary to determine whether the Union had other reasonable alternatives for communicating with employees"* (J.A. 17-19).

3. The Second Circuit's Decision

On petition of the Board, the Second Circuit, on November 6, 1963, issued its opinion and entered ~~a decree~~ granting enforcement of the Board's order without modification on December 2, 1963.

Disregarding the distinctions between oral solicitation and the distribution of literature, and contrary to the Third Circuit in *N.L.R.B.* v. *Rockwell Mfg. Co.*, 271 F. 2d 109, the court held that the Board was not required "~~to consider, in evaluating the~~ no-solicitation rule, whether the employees have alternative means of communication" but could attach a "presumption" of illegality to the ban against the distribution of union literature "by employees on their own time in nonworking areas", which presumption could be overcome "only on a showing that special circumstances make the rule necessary to maintain production or discipline" (*infra*, pp. 4a, 3a).

The court disposed of the "resultant littering, resultant unruly demonstrations in the plant cafeteria, and abusive language used by a distributor" by stating that the "record sustains the Board's finding" that these were "questionable after-the-fact rationalizations and insufficient to explain the institution of the rule" (*infra*, p. 3a). As to the contents of the leaflets the

court disposed of this question in a footnote with the comment that "While there may conceivably be instances in which union literature is so defamatory that an employer would be justified in prohibiting its distribution on company premises, we do not find that the leaflets disseminated in the three-month period preceding the ban in the present case fall into this category" (*infra*, p. 3a).

REASONS FOR GRANTING THE WRIT

1. On the question of whether the Board was required to consider the evidence that Union members had adequate opportunity to distribute literature to employees at the single entrance to the plant in evaluating the ban imposed by petitioner here, the decision of the court below is directly in conflict with the Third Circuit's decision in *N.L.R.B.* v. *Rockwell Mfg. Co.*, 271 F. 2d 109. In that case, similarly involving a ban against employee distribution of literature on company premises, the Third Circuit (after reviewing this Court's decisions in *Republic Aviation Corp.* v. *N.L.R.B* and *N.L.R.B.* v. *Le Tourneau Co.*, 324 U.S. 793; *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105; and *N.L.R.B* v. *United Steelworkers of America*, 357 U.S. 357) held (at p. 115) that—

> * * * the Board was bound to consider not only the evidence that was offered as to the impact that the distribution of literature would have on plant discipline, cleanliness, order, etc., but also the effect that the bar against distribution would have on the ability of the employees to organize. Thus, the Board was constrained to consider such evidence as the availability of sidewalk distributions, the small size of the community as indicating the practicality of home solicitation and telephonic communications. * * *.

Explaining the necessity for this conclusion, the Third Circuit (*ibid.*, p. 115) pointed out—

> This is not to say that the Board could not apply a presumption of invalidity to the no-distribution rule. But the burden of proving the unfair labor practice is on the charging party. In order to determine whether the respondent had justified its rule the Board is compelled to examine all of the evidence. If the respondent is entitled to justify its rules, the Board must examine respondent's evidence. Clearly, if the employees have virtually no alternative opportunities to distribute literature and membership applications, then the respondent must show strong justification for its prohibition. Conversely when, as the respondent contends in this case, the employees have readily available alternative means of distribution, the employer's duty to show exceptional justifying circumstances is lessened.

The court below conceded that its conclusion was in conflict with the Third Circuit's decision in *Rockwell* (*infra*, p. 4a). The court below asserted that the Third Circuit reached its "conclusion that available alternatives of communication must be considered in evaluating a no-solicitation rule" on an erroneous interpretation of the above cited decisions of this Court—and which the court below expressly rejected (*infra*, pp. 6a-7a).

This, it is submitted, this Court should grant the writ because of the clear disagreement between the Second Circuit here and the Third Circuit in the *Rockwell* case as to the obligation of the Board to consider *all* evidence adduced by an employer in justification of its refusal to make its premises available for the distribution of union literature, including evidence of alternate means of communication.

2. It is respectfully submitted that the Third Circuit correctly interpreted this Court's decisions regarding the rights of a union and its employee supporters to use an employer's premises for the distribution of pro-union literature and that the court below, erroneously refusing to recognize a difference between distribution of union literature and oral solicitation of union memberships—a difference recognized even by the Board itself (see, *e.g.*, *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615)—has misconstrued these decisions.

In the consolidated cases of *Republic Aviation Corp.* v. *N.L.R.B.* and *N.L.R.B.* v. *Le Tourneau Co.*, 324 U.S. 793, this Court expressly noted of the *Le Tourneau* situation (which involved a ban against the distribution of union literature by employees on their own time in the company's parking lots) that (at p. 797)—

> * * * contact on public ways or on non-company property with employees at or about the establishment is limited to those employees, less than 800 out of 2100, who are likely to walk across the public highway near the plant on their way to work, or to those employees who will stop their private automobiles, buses or other conveyances on the public roads for communications. The employees' dwellings are widely scattered.

As to *Republic* (which involved discharges for soliciting memberships during nonworking times and wearing union buttons in the plant in violation of a broad no-solicitation rule), the Court noted (at p. 800) that it was—

> * * * a non-urban manufacturing establishment for military production which employed thousands. It was growing rapidly. Trains and automobiles gathered daily many employees for the plant from an area on Long Island, certainly larger than walking distance.

Thus, it is clear that this Court in those cases, contrary to the assertion of the court below (see *infra*, p. 7a), did regard the matter of alternate avenues of communication as relevant to the questions presented. Although this Court noted (at pp. 798-799) that "Neither in the Republic nor the Le Tourneau cases can it properly be said that there was evidence or a finding that the plant's physical location made solicitation away from company property ineffective to reach prospective union members," it also stated (at p. 801) that in neither case was evidence "offered that any unusual conditions existed in labor relations, the plant location or otherwise to support any contention that conditions at this plant differed from those occurring normally at any other large establishment." Noting that "These were the facts upon which the Board reached its conclusions as to unfair labor practices" (at p. 801), and that the employers had not applied in the courts below "to introduce additional evidence to show unusual circumstances involving their plants or for other purposes" (at p. 804), this Court held, in substance, that the Board properly acted in these cases on the presumptions adopted in other cases predicated on its "appraisal of normal conditions about industrial establishments" (at p. 804). Here we have an entirely different situation. Petitioner adduced evidence showing the adequacy of an alternate place of distribution which the Board refused to consider.

The court below plainly misconstrued the holding in *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105. This Court there overruled Board holdings that because "it was unreasonably difficult for the union organizer to reach the employees off company property" he should be allowed access to the company parking lots for the

distribution of union literature (see p. 106). The Court noted that other "instruments of publicity are at hand" (see p. 113), referring to "the mails," "street" contacts, "the telephone," and "home" visits (see p. 106, fn. 1), and held that the Board "failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees" (at pp. 112-113). The only "rule" there involved was whether when union literature could not be distributed off company property its distribution should be permitted on the premises. The Court held, in substance, that while employees could not be barred under these circumstances unless "necessary to maintain production or discipline," "no such obligation is owed nonemployee organizers" (p. 113). The Court noted that "This is not a problem of always open or always closed doors for union organization on company property" but involves an "accommodation" between the property rights of employers and the organizational rights of employees (p. 112). In conclusion, the Court stated (pp. 113-114):

> The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available.

This Court in *Babcock & Wilcox*, thus plainly held that the availability of another place to distribute union literature is a relevant factor to be considered even when employees are involved. This was reiterated in *N.L.R.B.* v. *United Steelworkers of America*, CIO, 357 U.S. 357, where this Court, in upholding the enforcement of rules prohibiting employees from union

solicitation or distribution of literature on company premises, stated (p. 363):

> No attempt was made in either of these cases to make a showing that the no-solicitation rules truly diminished the ability of the labor organizations involved to carry their message to the employees. *Just as that is a vital consideration in determining the validity of a no-solicitation rule*, see Republic Aviation Corp. v. National Labor Relations Board, supra, 324 U.S. at pages 797-798, 65 S. Ct. at pages 985-986; National Labor Relations Board v. Babcock & Wilcox Co., supra, 351 U.S. at page 112, 76 S. Ct. at page 684, *it is highly relevant in determining whether a valid rule has been fairly applied.* (Italics added)

The observation of the court below (*infra*, p. 7a) that the *Steelworkers* decision is inapposite because "otherwise valid" rules were involved is completely at odds with the foregoing excerpt from that very decision.

In this matter, the Union members had ample opportunity to distribute their propaganda to employees off company property at the single entrance to the company's premises (J.A. 111; *supra*, p. 8). Moreover, the Union and its supporters had available to them the usual alternate media of communication—the mail, newspapers, radio, television, etc. (see Tr. 84-90). In addition, as a recognized and contracting bargaining agent it had bulletin board privileges in the plant and established grievance procedures (J.A. 60-64; *supra*, p. 3).

But assuming that the Second Circuit were correct in its interpretation of this Court's decisions, rather than the Third Circuit, it nonetheless seems appropriate that the writ here be granted to settle beyond doubt

the holdings of this Court on this subject as to which these two circuit courts have so strongly disagreed. The Board did not seek certiorari in *Rockwell*. The denial of the writ here would contribute to uncertainty rather than certainty.

3. The ban imposed here was not a broad "no-distribution rule". Rather, the ban was limited to a particular type of literature, *viz.*, that which was "designed to incite employees and to tell them what a lousy place Pratt Whitney was to work" (J.A. 155). It was only "the distribution of such literature" on company premises that Chamberlain was told was being banned (J.A. 155). The Union has never requested or been denied permission to distribute proper literature on company premises. Instead, at the ramp it continued to distribute literature whose contents were "manifestly destructive of discipline". *Maryland Drydock Co.* v. *N.L.R.B.*, 183 F. 2d 538, 542 (C.A. 4).

The holding of the court below that petitioner could not withdraw use of its premises for the distribution of such literature is, it is believed, directly in conflict with *Maryland Drydock Co.* v. *N.L.R.B.*, 183 F. 2d 538 (C.A. 4), and *N.L.R.B.* v. *Aintree Corp.*, 135 F. 2d 395 (C.A. 7), cited to the court below but not mentioned in its opinion, where bans against distribution of similar literature on company premises were upheld.

4. The issues involved in this case are of broad significance. Under the Board's order, enforced by the court below, petitioner expressly is prohibited from imposing "any" restriction on employees distributing "any" union literature during nonworking times and in nonworking areas of its premises. In the glossary of the decisions of the Board and the court below, it is clear that the Board and the court below interpret the law to require exactly what the order states

—namely, that an employer make available to employees, during nonworking times, *any* and *all* nonworking areas of its premises for the distribution of *any* kind of union literature. Although the Board and the court below both professed that an exception is permissible upon a showing of "special circumstances" necessitating a restriction "to maintain production or discipline", it is clear that such "special circumstances", under their decisions, probably never could be shown.

Thus, the Board and the court below eliminated, as factors to be considered, evidence showing that the union, the long-standing collective bargaining representative of the employees, had contractual grievance procedures; plant bulletin board privileges, and other adequate places to distribute its propaganda, and that the employer had no anti-union animus. They then discarded as afterthoughts the series of union abuses, culminating in the cafeteria disturbances, assigned by petitioner as reasons for finally withdrawing use of its premises for the distribution of the provocative literature. As to the contents of the literature, they held that employees have a practically unrestrictable right to distribute any kind of union literature in the non-working areas of an employer's property. As to littering, the court below held that such "is inevitable" and cannot establish the "special circumstances" required to justify a ban on use of company premises (*infra*, p. 3a).

Finally, as to the breakdown in discipline in the cafeteria, the Board held, and the court sustained the finding (J.A. 17; *infra*, p. 3a), that the leaflets did not encourage the disorders because there was "nothing in the leaflets which advocated such action", but even if they did, petitoner did not show "that the ban

was necessary" because it controlled the situation by threatening the "employees with diciplinary action" (J.A. 17). Under this process of reasoning it is impossible to conceive of a situation in which "special circumstances" may be shown justifying a ban on the use of company premises. It is highly unlikely that union literature would ever specifically advocate a disruption of production or discipline, or that a resultant disruption of either could not be controlled by some manner of disciplinary action.

Such an approach disregards entirely the right of the employer to anticipate "the effect which [such literature] might normally be expected to produce" and not wait "upon ex post facto proof of the results which actually flowed from its distribution". *Maryland Drydock Co.* v. *N.L.R.B.*, 183 F. 2d 538, 541 (C.A. 4). See also *N.L.R.B.* v. *Aintree Corp.*, 135 F. 2d 395, 397 (C.A. 7); *Caterpillar Tractor Co.* v. *N.L.R.B.*, 230 F. 2d 357, 359 (C.A. 7).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GERARD D. REILLY.
JOSEPH C. WELLS
1120 Tower Building
Washington, D. C. 20005
Attorneys for Petitioner

REILLY AND WELLS
1120 Tower Building
Washington, D. C. 20005
Of Counsel

January 1964

APPENDIX

APPENDIX A

National Labor Relations Act

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 45—September Term, 1963.

(Argued October 10, 1963 Decided November 6, 1963.)

Docket No. 28004

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

UNITED AIRCRAFT CORPORATION, PRATT & WHITNEY AIRCRAFT DIVISION, *Respondent*.

Before: CLARK, MOORE AND KAUFMAN, *Circuit Judges*.

Petition by the National Labor Relations Board for enforcement of its order of October 10, 1962, 139 NLRB No. 12.

The National Labor Relations Board, finding United Aircraft Corporation, Pratt & Whitney Aircraft Division's no-solicitation rule to be in violation of §8(a)(1) of the National Labor Relations Act, 29 U. S. C. §158(a)(1), ordered its rescission and now seeks enforcement of that order. Order enforced.

James Paris, Atty., National Labor Relations Board, Washington, D. C. (Arnold Ordman, Gen. Counsel, Dominick L. Manoli, Asso. Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, and Solomon I. Hirsh, and Robert A. Armstrong, Attys., National Labor Relations Board, Washington, D. C., on the brief), *for petitioner*.

Gerard D. Reilly, of Reilly & Wells, Washington, D. C. (Joseph C. Wells, of Reilly & Wells, Washington, D. C., on the brief), *for respondent*.

CLARK, *Circuit Judge:*

The National Labor Relations Board found respondent to have violated §8(a)(1) of the National Labor Relations Act, 29 U. S. C. §158(a)(1), by prohibiting employees from distributing union literature on their own time in nonworking areas of respondent's plant. Respondent offered grounds for its rule: resultant littering, resultant unruly demonstrations in the plant cafeteria, and abusive language used by a distributor of the pamphlets. The Board found these to be questionable after-the-fact rationalizations and insufficient to explain the institution of the rule. The record sustains the Board's finding.

Rules prohibiting solicitation by employees on their own time in nonworking areas can be upheld only on a showing that special circumstances make the rule necessary to maintain production or discipline. See *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 803, 157 A. L. R. 1081; *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 113; *N. L. R. B.* v. *Linda Ja Shoe Co.*, 5 Cir., 307 F. 2d 355, 357; *N. L. R. B.* v. *Walton Mfg. Co.*, 5 Cir., 289 F. 2d 177, 180. Since litter is inevitable when leaflets are distributed and since the literature did not cause the disturbance in the cafeteria, respondent has clearly failed to show special circumstances making its rule necessary for the maintenance of production or discipline.[1]

---

[1] As an additional justification for its nonsolicitation rule, the respondent asserted that the leaflets vilified the company and its officials in false and scurrilous language. While there may conceivably be instances in which union literature is so defamatory that an employer would be justified in prohibiting its distribution on company premises, we do not find that the leaflets disseminated in the three-month period preceding the ban in the present case fall into this category. No proof was offered which would indicate that any of the statements made were maliciously false; and a union engaged in an intensive organizational campaign should not be expected to communicate in the most moderate of terms.

It argues, however, that the Board erred in failing to consider, in evaluating the no-solicitation rule, whether the employees have alternative means of communication. Respondent is not without support in this position. See *N. L. R. B.* v. *Rockwell Mfg. Co. (Du Bois Division)*, 3 Cir., 271 F. 2d 109.

It is clear that in exercising its "special function of applying the general provisions of the Act to the complexities of industrial life" the Board is not required to consider and make findings on every contention raised in defense or every aspect of the problem presented. *N. L. R. B.* v. *Erie Resistor Corp.*, 373 U. S. 221, 236. It can in some cases infer the existence of discrimination from its past experience in such factual inquiries. *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *N. L. R. B.*, 365 U. S. 667, 675; *Radio Officers' Union of Commercial Telegraphers Union, AFL* v. *N. L. R. B.*, 347 U. S. 17, 49, 41 A. L. R. 2d 621. Of course presumptions utilized by the Board must be rationally justifiable; there must be a logical nexus between what is proved and what is presumed. See *Republic Aviation Corp.* v. *N. L. R. B.*, *supra*, 324 U. S. 793, 804-805. See also 2 Davis, Administrative Law Treatise §15.04 (1958).

The issue thus presented is whether consideration of available alternatives is necessary to make the presumption in question rational. In *Republic Aviation Corp.* v. *N. L. R. B.*, *supra*, 324 U. S. 793, 804, the Supreme Court considered and approved the NLRB presumption against no-solicitation rules in the "definitive form" expressed in *Peyton Packing Co.*, 49 NLRB 828, 843, enforced *N. L. R. B.* v. *Peyton Packing Co.*, 5 Cir., 142 F. 2d 1009, cert. denied 323 U. S. 730. The presumption approved clearly was independent of the existence of alternative means of communication. Cf. *N. L. R. B.* v. *United Steelworkers of America, CIO*, 357 U. S. 357, 367 (opinion of Chief Justice Warren, concurring in part and dissenting in part).

Reason and the demands of sound administrative policy support the Court's approval of the *Peyton Packing Co.* formulation. The chances are negligible that alternatives equivalent to solicitation in the plant itself would exist. In the plant the entire work force may be contacted by a relatively small number of employees with little expense. The solicitors have the opportunity for personal confrontation, so that they can present their message with maximum persuasiveness. In contrast, the predictable alternatives bear without exception the flaws of greater expense and effort, and a lower degree of effectiveness. Mailed material would be typically lost in the daily flood of printed matter which passes with little impact from mailbox to wastebasket. Television and radio appeals, where not precluded entirely by cost, would suffer from competition with the family's favorite programs and at best would not compare with personal solicitation. Newspaper advertisements are subject to similar objections. Sidewalks and street corners are subject to the vicissitudes of climate and often force solicitation at awkward times, as when employees are hurrying to or from work.

It might be suggested that it would be harmless to require the Board to make findings in all no-solicitation cases. But in addition to being an appreciable increase in the Board's already unwieldy work load, this would simply be an incitement to litigation and casuistry.

Even apart from considerations involving the remoteness of the existence of realistic alternatives, we feel that the Board's position is sound. It summarized the basis for its view in *Peyton Packing Co., supra*, 49 NLRB 828, 843-844, quoted with approval in *Republic Aviation Corp. v. N. L. R. B., supra*, 324 U. S. 793, 803, n. 10: "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the

absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." See also *Walton Mfg. Co.*, 124 NLRB 1331, 1335.

The Board is manifestly correct. We have long passed the point where the bundle of property rights can be used arbitrarily or capriciously to restrict a worker's freedom of association or expression. See *N. L. R. B.* v. *United Steelworkers of America, CIO*, *supra*, 357 U. S. 357, 369 (opinion of Chief Justice Warren, concurring in part and dissenting in part). It is inevitable that the thrust of an organizational drive would be blunted by rules which cut into a worker's use of his own time and made his association and expression subject to management limitations. Clearly the existence of available alternatives would not mitigate this deleterious effect or insure the employee the organizational freedom which the Act seeks to give him. Cf. *N. L. R. B.* v. *Erie Resistor Corp.*, *supra*, 373 U. S. 221, 236. See also *N. L. R. B.* v. *William Davies Co.*, 7 Cir., 135 F. 2d 179, cert. denied *William Davies Co.* v. *N. L. R. B.*, 320 U. S. 770.

The Third Circuit in *N. L. R. B.* v. *Rockwell Mfg. Co. (Du Bois Division)*, *supra*, 3 Cir., 271 F. 2d 109, reached the conclusion that available alternatives of communication must be considered in evaluating a no-solicitation rule not on a consideration of the rationality of the Board's

presumption or of the policy involved, but rather on the ground that it was constrained to do so by the governing law. We do not so read the trilogy which forms *Rockwell's* foundation.

Republic Aviation Corp. v. *N. L. R. B., supra*, 324 U. S. 793, 803, n. 10, with its clear approval of *Peyton Packing Co., supra*, 49 NLRB 828, 843-844, is strong authority for the position that the consideration of available alternatives is not required. *N. L. R. B.* v. *Babcock & Wilcox Co., supra*, 351 U. S. 105, while holding that nonemployee organizers could be forbidden to solicit on company property when reasonable alternatives were available, made it clear that the employees in exercise of their rights are not to be judged by the same standards as nonemployees. Further, it cites *Republic Aviation Corp.* v. *N. L. R. B., supra*, 324 U. S. 793, as controlling with regard to employees. The third case, *N. L. R. B.* v. *United Steelworkers of America, CIO, supra*, 357 U. S. 357, 362, did not involve the validity of a no-solicitation rule, but rather the "very narrow and almost abstract question" whether, when an employer engages in antiunion solicitation in a manner forbidden to his employees by an otherwise valid no-solicitation rule, it is an unfair labor practice to enforce the rule against them. In this context the Court held the consideration of available alternatives to be relevant. This is clearly distinguishable from a case where the justifiableness of the no-solicitation rule is in question, rather than the propriety of the employer's use of means he had forbidden to the employees. The Third Circuit relied upon the Court's passing reference to *Republic Aviation Corp.* v. *N. L. R. B., supra*, 324 U. S. 793, as authority for the broad proposition that the showing of a diminished union power to organize was vital in ascertaining the validity of a no-solicitation rule. *N. L. R. B.* v. *Rockwell Mfg. Co. (Du Bois Division), supra*, 3 Cir., 271 F. 2d 109. But as Chief Justice Warren pointed out, concurring in part and dissenting

in part, *N. L. R. B.* v. *United Steelworkers of America, CIO*, *supra*, 357 U. S. 357, 367, the evidence and findings required by the Court were not required in *Republic Aviation Corp.* v. *N. L. R. B.*, *supra*, 324 U. S. 793, or in *Peyton Packing Co.*, *supra*, 49 NLRB 828, which *Republic* approved. We cannot read the Court's dictum as erasing the important qualification established in *Republic* that no such showing was required where employees alone are involved. See *Time-O-Matic, Inc.* v. *N. L. R. B.*, 7 Cir., 264 F. 2d 96, 101.

The order will accordingly be enforced, and a decree of enforcement will issue.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 28004

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

UNITED AIRCRAFT CORPORATION, PRATT AND WHITNEY AIRCRAFT DIVISION, *Respondent*.

Decree

Before: Clark, Moore and Kaufman, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on October 10, 1962. The Court heard argument of respective counsel on October 10, 1963, and has considered the briefs and transcript of record filed in this cause. On November 6, 1963, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that United Aircraft Corporation, Pratt and Whitney Aircraft Division, its officers, agents, successors and assigns abide by and perform the direction of the Board in said order contained.

s/ CHARLES E. CLARK
Judge, United States Court of Appeals for the Second Circuit

s/ LEONARD T. MOORE
Judge, United States Court of Appeals for the Second Circuit

Filed: Dec. 2, 1963